91-1507

Supreme Court, U.S.
FILED
MAR 19 1992
OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STEPHEN A. KOCZAK

Petitioner

v.

JIM SMITH,
Secretary of State, State of Florida;
ROBERT A. BUTTERWORTH,
Attorney General, State of Florida
CHARLES WHITEHEAD,
Chairman Florida Democratic Party;
JOHN W. VOGT,
President, Florida Senate;
JON MILLS,
Speaker, Florida House of Representatives

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Stephen A. Koczak, *Pro Se*
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Washington, D.C. 20008
(202) 686-0953/363-4750

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QUESTIONS PRESENTED

1. Whether the decision of the U.S. Appeals Court for the Eleventh Circuit upholding Florida Statute Chapter 103, Section 103.101 (2) (a) and (b) which provides for the exclusive selection for primary ballot access of candidates acceptable to a statutory committee and which provides no alternate access whatsoever to the Florida presidential primary ballot is in conflict with prior Supreme Court decisions, including *Lubin v. Panish*, 415 U.S. 709 (1974)?

2. Whether, the Florida Statute Chapter 103, Section 103.101(2)(a) and (b), is constitutional in light of Supreme Court decisions, including *Democratic Party of the United States v. Wisconsin*, 101 S. Ct. 1010 (1981), 450 U.S. 107 (1981) and *Tashjian v. Republican Party*, 107 S. Ct. 544 (1986) prohibiting state action and intervention in partisan political party internal affairs?

3. Whether, there being no alternative access to the ballot, the actions of the Presidential Candidate Selection Committee are state action as a "pre-primary" held by a small statutory "insider" group accountable only to itself in violation of the First and Fourteenth Amendments and the Civil Rights laws?

4. Whether the Florida Attorney General, by officially representing in the courts the Speaker of the Florida House of Representatives and the President of the

Senate as members of the Presidential Candidate Selection Committee establishes and confirms that the participation of these members of the State Legislature constitute state action of that Committee?

5. Whether the activities of the Florida Presidential Candidate Selection Committee (composed of the Secretary of State, a member of the executive branch; the President of the Senate and the Speaker of the House of Representatives, members of the legislative branch; and a member of a partisan political party) are state actions violating the separation of powers clauses of the United States and Florida constitutions?

6. Whether the Florida Legislature can constitutionally create for, or delegate to, any of its own members, the right to intervene ex officio as legislators in internal partisan political party affairs to approve or disapprove the names of candidates and delegates for a presidential primary election?

7. Whether the United States District Court for the Northern District of Florida, Tallahassee Division, and the United States Appeals Court for the Eleventh Circuit rendered judgments in conflict with United States Supreme Court decisions and departed from the usual course of judicial proceedings by failing to give close scrutiny to the facts in this case?

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INTERESTED PARTIES

To assist in the consideration of this appeal and pursuant to Rule 14 of the Supreme Court of the United States, there appear below the names and titles of the parties who were involved in the events leading to this case and have an interest in this outcome of this petition:

JAMES SMITH, Secretary of State, State of Florida

ROBERT A. BUTTERWORTH, Florida Attorney General

JOHN W. VOGT, President, Florida Senate

JON MILLS, Speaker, Florida House of Representatives

CHARLES WHITEHEAD, Chairman, Florida Democratic Party

GEORGE L. WAAS, Attorney with the office of the Florida Attorney General, Civil Division, Counsel for Appellee Smith, and Defendants Vogt and Mills

JOHN H. FRENCH, JR., Counsel for Defendent Whitehead

STEPHEN A. KOCZAK, Plaintiff/Appellant/ Petitioner

THE HONORABLE MAURICE M. PAUL, United States District Court Judge, Tallahassee Division, Northern District of Florida

ELEVENTH CIRCUIT JUDGES EDMONDSON, BIRCH and DUBINA

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CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED IN THE CASE

UNITED STATES CONSTITUTION

ARTICLE II, SECTION 1 (5)

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years and been fourteen years a resident within the United States.

ARTICLE IV, SECTION 2 (1)

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

ARTICLE VI, SECTIONS (2) AND (3)

(2) This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

(3) The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and

of the several States, shall be bound by oath or affirmation, to support this Constitution; but no relgious test shall ever be required as a qualification to any office or trust under the United States.

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT, SECTION ONE

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA STATUTES

CHAPTER 103 Section 103.101 **Presidential preference primary.**

(2) There shall be a Presidential Candidate Selection Committee composed of the Secretary of State, who shall be

a nonvoting chairman; the Speaker of the House of Representatives; the President of the Senate; the minority leader of each house of the Legislature; and the chairman of each political party required to have a presidential preference primary under this section.

(a) By December 31 of the year preceding the Florida presidential preference primary, each political party shall submit to the Secretary of State a list of its presidential candidates to be placed on the presidential preference primary ballot or candidates entitled to have delegates appear on the presidential preference primary ballot. The Secretary of State shall prepare and publish a list of the names of the presidential candidates submitted. The Secretary of State shall submit such list of names of presidential candidates to the selection committeee on the first Tuesday after the first Monday in January each year a presidential preference primary election is held. Each person designated as a presidential candidate shall have his name appear, or have his delegates' names appear, on the presidential preference primary ballot unless all committee members of the same political party as the candidate agree to delete such candidate's name from the ballot.....

(b) Any presidential candidate whose name does not appear on the list submitted to the Secretary of State may request that the selection committee place his name on the ballot. Such request shall be made no later than the second Tuesday after the first Monday in January.

RULES OF THE SUPREME COURT

Rule 10

Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certioriari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

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OPINION IN THE CASE

The opinions of the Court of Appeals have not been published but appear in the Appendix hereto as Numbers Items 6, 7, 8 . Mandate has been stayed until 20 March, 1992, text of which Stay appears as Appendix Item Number 9. The rulings and opinions of the District Court appear in the Appendix hereto as Numbers l, 2, 3, 4, and 5.

JURISDICTIONAL GROUNDS IN THIS COURT

The order and opinion of the Court of Appeals denying timely petition for review *en banc* was entered on December 20, 1991, reaffirming orders and opinions of September 27, 1991 and June 25, 1991.

The statutory provision that confers jurisdiction on this Court to review this case by writ of *certiorari* is 28 U.S. C. #1254(1). Petition is submitted under Rule 10 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance were the United States Constitution, Articles II, IV, and V, Amendments One and Fourteen; Title 42 USC Sections 1983, 1985, 1986, 198l et seq and 1973; and Title 28 USC Sections 1331 and 1343.

The critical facts concern actions taken by the Florida Legislature to interfere directly by State Action in the internal affairs of the established and recognized partisan political parties in a manner to limit access to the Presidential Primary ballot of persons whom members of the Legislature oppose.

These actions were authorized by the Florida legislature in 1986 and are now implemented by two provisions.

The first is the Presidential Candidate Selection Committee (hereafter called the Committee), a majority of which is composed of four members of the Florida Legislature, designated ex officio Committee voting members as the President of the Senate and the Speaker of the House of Representatives and the senior Minority Members respectively of each of those legislative bodies. Joining them as voting members are the Chairman, respectively, of the Florida Democratic and Republican Parties and the Secretary of State, serving as a non-voting member.

Convoked by the Secretary of State, the voting Members, acting in each others' presence but ostensibly voting as factions empowered to act in the names respectively of the Republican and Democratic parties, decide by rules, criteria and standards of their own novel, arbitary and ad hoc making which persons shall be admitted to the Presidential Primary Ballot. Under the Statute, as

extant in 1988, no possibility and no mechanism whatsoever exists for any appeal from their decisions.

The second arrangement assuring State Action and control by the Committee is the total absence of any alternative means of access to the Presidential primary election ballot, either by fee, petitions with signatures, or places on the printed ballots for write-in votes.

CHANGES IN THE LAW

This statutory arrangement was enacted in 1986 designed to preclude any possibility of access to the Presidential Primary election ballot by persons not acceptable to senior Members of the Florida Legislature acting in concert with the Chairman, respectively, of the Florida Democratic and Republican parties.

Prior to 1986, persons who demonstrated to the Secretary of State that they qualified as recognized political party members and candidates under explicitly prescribed statutory criteria and standards (such as eligibility for financial contributions from the Federal Election Commission, national reputation, or endorsement by major citizen organizations) could obtain access to the ballot.

These earlier criteria and standards for selection were repealed and the Committee is free to establish *ad hoc* and *ad personam* any criterion or standard of its own making.

The Committee Members of the Florida legislature are designated by the statute in their official legislative capacities and not by their standing or authority in the political party structure, removing them from accountability to the generality of the regular members of the Florida Democratic and Republican parties. Thus, the ordinary members of the political parties in whose ostensible names these Committee Members make their decisions are deprived of any influence in the admission or exclusion of candidates to the ballot.

The composition of the Committee, the duplicitous character of its Members (Legislators claiming to act in the Committee as Political Party functionaries and, yet, represented by the Florida Attorney General before the judiciary as Government officials) and the total absence of alternative access to the Primary ballot raise grave issues under the U.S. Constitution.

The circumstances of the enactment in 1986 of this highly restrictive ballot access statute giving preponderant weight to political ex officio "insiders" not accountable to the regular political party membership indicate a clear intent to evade and avoid the Constitutional and statutory rights both of candidates and of voters .

THE CONDUCT OF THE ATTORNEY GENERAL

Equally disquieting is the behavior of the Attorney General. First, he represents in the courts the President of the Senate and the Speaker of the House of Representatives as government officials and not as partisan politcal party members. Second, he falsely states that an alternate access to the primary ballot exists when it does not. Third, he further obfuscates the facts by his formulation of the pleadings to have it appear that the actual role of the Legislators as voting members of the Committee is identical with that of the Secretary of State who is a non-voting member.

THE INDIFFERENCE OF THE DISTRICT AND APPELLATE COURTS

Most painful is the absence of close scrutiny by the District and the Appellate Courts of the Eleventh Circuit which persist in refusing to examine the issue of State Action raised by the presence of the members of the Florida legislative branches on the Committee. In his own situation, Petitioner has repeatedly raised this issue and the Courts have repeatedly averted their attention from it.

Even more disturbing is the aversion of the Courts in the Circuit to the decision of the Supreme Court in *Lubin v. Panish*, 415 US 709 (1974), ruling that an alternate reasonable means of access even to a primary election ballot was mandatory if the election laws were to abide by the U.S. Constitution.

As a result, the precise situation which the Supreme Court feared, and which Plaintiff had addressed, occurred subsequently in the Committee in 1992, confirming the dangers of State Action inherent in Florida Statutes Chapter 103, Section 103.101.

In *Lubin v. Panish, supra,* (page 716) the Supreme Court quoted *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) as follows:

{T}he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.

The Court continued:

This must also mean that the right to vote is "heavily burdened" if that vote may be cast only for one of two candidates in a primary election when other candidates are clamoring for a place on the ballot. (Emphasis added.)

Yet, in 1992, by action of the Committee, Republican party members could cast their vote in the primary election for "only for one of two candidates" (George Bush and Patrick Buchanan). The other Republican candidates, to all of whom the Members of the Committee were opposed for a variety of different *ad hoc* or *ad personam* reasons, were denied access to the ballot.

THE 1986 STATUTE NEEDS TO BE EXAMINED IN TERMS OF ITS CONSEQUENCES

Plaintiff interposes these 1992 events, subsequent to his suit but now ratified by the District Court for the Southern District of Florida, into his pleading here to beseech most earnestly the Supreme Court to examine closely the consequences of Florida's 1986 Statute. This Statute and the conflicting and contradictory primary election laws in other States have led to a growing public confusion about the fairness and equity of the American Presidential primary election processes of the principal political parties nominating candidates for the offices of President and Vice President of the United States.

Petitioner also prays the Supreme Court to establish some clear standard to bring a modicum of order into the growing conflicting and apparently contradictory decisions of the various Circuit Courts.

REASONS FOR GRANTING THE WRIT

The issue before the Supreme Court relates to State Action by the Presidential Candidate Selection Committee intervening under "cover of law" in the internal affairs of partisan political parties, thereby implementing the extreme anti-democratic character of the Florida Presidential Primary election statute which is in violation of the Constitution of the United States as affirmed by a long succession of Supreme Court decisions, including, inter alia, *Lubin v. Panish*, 415 U.S. 709, 94 S. Ct. 1315 L.Ed. 2d, 702 (1974), *Democratic*

Party of the United States v. Wisconsin, 101 S. Ct. 1010 (1981), 450 U.S.C.107 (1981) and *Tashjian v. Republican Party*, 107 S. Ct. 544 (1986).

Before proceeding to cite other Supreme Court decisions with which both the District and Appellate Courts of the Eleventh Circuit are in conflict, petitioner invites particular attention to the fact that neither of the lower Courts attended to, or addressed, the subject of the ex officio statutory presence of Members of the Florida Legislature on the Presidential Candidate Selection Committee and neither considered the Constitutional provisions petitioner invoked.

Instead, both Courts limited their decisions to the Federal Civil Rights laws enacted by Congress.

For example, United States District Judge Maurice M. Paul, in **denying** a temporary restraining order or preliminary injunction, concluded on January 19, 1988 as follows:

"First, the Court finds that the role of the Florida Democratic Party under Section 103.101 does not rise to the level of state action sufficient to state a claim under the Civil Rights Act." (Please see Appendix 2 in the Appendix of Court Orders and Decisions.)

In a similar, if not identical, posture, the Appellate Court restricted its examination of this suit to the Civil Rights Act, reaching the following conclusion in its June 25, 1991 Order (which is quoted in its entirety):

"Before EDMONDSON, BIRCH and DUBINA, Circuit Court Judges.

PER CURIAM:

Assuming for the sake of argument that defendants acted under color of state, plaintiff has failed to show a deprivation of a protected federal right. The pertinent entire election process does not fail to afford fundamental fairness. The district court did not abuse its discretion in denying a preliminary injunction because there was little likelihood of success on the merits.

AFFIRMED."

(Please see Appendix 6 in the Appendix of Court Orders and Decisions.)

It should be noted that the Appellate Court referred solely to the issue of the "preliminary injunction" when only the Secretary of State and the Chairman of the Florida Democratic Party were defendants.

The Appellate Court did not address the text of the FINAL SUMMARY JUDGMENT which was the specific judgment against which Petitioner had appealed. The defendants in the FINAL SUMMARY JUDGMENT included the President of the Senate and the Speaker of the House of Representatives.

In his two subsequent appeals for relief to the Appeals Court, citing various decisions of the Supreme Court and emphasizing the failure of the District Judge to examine both

the activities of the President of the Florida Senate and the Speaker of the Florida House of Representatives and the false claims of the Florida Attorney General regarding a (non-existent) alternative ballot access, petitioner sought for an expansion and clarification by the Appellate Court of the phrase, **"..deprivation of a protected federal right."**

Petitioner sought to ascertain whether the phrase, **"..a protected federal right.."**, was used and restricted by the Appellate judges solely to the Civil Rights Act which the District Court judge specifically cited, or was the phrase intended by the Appellate judges to extend to appellant's Constitutional rights as well, given the presence of the Legislators as voting Members of the Selection Committee.

Petitioner contends, moreover, that the Civil Rights Acts do not expand or modify the Constitution itself. They are legislative acts enabling the executive branch and the courts to provide the most careful scrutiny mechanism to any effort in the affected States to deprive traditionally oppressed or deprived constituencies of their already existing Constitutional rights.

In brief, "protected" groups did not acquire any additional Constitutional rights; they acquired the statutory right, the mechanism, and the opportunity to invoke the assistance and resources of the executive and judicial branches in examining profoundly any effort by authorities in the affected States to deny them existing Constitutional rights.

If petitioner's claim on the Constitutional status of the Civil Rights Acts is valid, it is evident that he also, despite the fact that he is not a member of a statutorily "protected" class, is entitled, when providing his own evidence of State Action under "color of law", to the same careful scrutiny by the Courts of the same Constitutional rights and safeguards as any person in the "protected" classes, **even though he is not provided any assistance by the governmental mechanism and resources available to persons in the "protected" classes.**

Although seeking assiduously clarification of the Appellate Court's reasoning, petitioner found the subsequent decisions of the Appeals Court totally unresponsive. In twice **denying** appellant's petition for rehearings, the Appellate Court did not indicate whether it considered in any way whatsoever the Constitutional claims which appellant had asserted from the outset of his suit. The Appellate Court did not address, for example, the fraudulent statements of the Florida Attorney General to which Petitioner had made repeated references.

On September 27, 1991, the Appellate Court issued the following decision and order:

"Before EDMONDSON, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by Appellant, Stephen A. Koczak, is DENIED.

ENTERED FOR THE COURT:
J. L. EDMONDSON (signed)
UNITED STATES CIRCUIT JUDGE

On December 20, 1991, in response to appellant' petition for rehearing *en banc*, the Appellate Court issued the following order:

"Before: EDMONDSON, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED."

ENTERED FOR THE COURT:
J. L. EDMONDSON (signed)
UNITED STATES CIRCUIT JUDGE"

(Please see Appendices 7 and 8 in the Appendix of Court Orders and Opinions.)

PREVIOUS CONSTITUTIONAL DECISIONS ON ELECTION LAWS

Petitioner listed seven questions at the very beginning of this petition.

All relate to fundamental Constitutional issues.

The decisions of the United States Supreme Court regarding these questions are numerous and reiterative, establishing that certain actions of a political party in the conduct of a primary election constitute state action within the meaning of the Fourteenth and other Amendments.

Among Supreme Court decisions so judging are *Gray v. Sanders*, 372 US 368 ((1963), clearly enunciating that political party actions are state actions and are under the "color of law"; *Terry v. Adams*, 345 US 461 (1953), wherein evasion of federal constitutional requirements by use of a more restricted, unofficial "pre-primary", conducted by a private organization before the official primary, was state action, the participants were acting under "color of law" and the entire process was given the "jaybird" label in constitutional jurisprudence; *Smith v. Allwight*, 321 US 649 (1944), *Nixon v. Herndon*, 273 US 536 (1927), *Nixon v. Condon*, 286 US 73 (1932), the so-called White Primary cases, support the tenet that all activities of political parties are deemed to be state responsibilities if they are closely related to the nomination of candidates who receive some preferential state treatment. State involvement in and regulation of the political party nominating process led the

Court to decide that the actions of the Democratic Party in these cases were state actions.

Especially significant and apposite are three decisions of the Supreme Court in judging petitioner's claims. These are *Davis v. Bandemer*, Docket No. 84-1244, dec. June 30, 1986, 106 US 2797; *Williams v. Rhodes*, 373 US 23 (1968); and *Anderson v. Celebrezze* 460 US 938 (1983).

In *Davis v. Bandemer*, the Supreme Court recognized the importance of applying equal protection of the laws under the Fourteenth Amendment to political as well as racial groups.

There can be no more important political group in American political life than the ordinary mainstream of political party voters and those candidates who emerge from their ranks rather than from the "insider" oligarchic circles and bureaucracies of the party's established managerial leadership, such as legislators who are able to make their own private partisan and arbitrary political arrangements with each other, including Legislative members of the opposite political party, out of the view of the mainstream membership of the parties to which they nominally belong.

This mainstream of the regular membership of the political party voters, expressing their collective party preferences principally through primary elections, are as important a political group as the minor parties and

candidates whose rights were recognized in *Williams v. Rhodes, supra.*

The reasoning of the Supreme Court in *Anderson v. Celebrezze*, 460 US 780 (1983) is particularly important here because it deals with Presidential elections. Specifically, the issue was the obtaining of ballot position by an Independent Candidate for President. The Supreme Court held that a candidate running for President of the United States implicated a uniquely important national interest in that the President and Vice President are the only elected officials who represent all the voters of the United States and, hence, the votes cast in one state affect the votes cast in other states.

In *Anderson supra*, the Supreme Court established a strict scrutiny test. First, the Court must balance the character and magnitude of the asserted rights of the state or the party against the rights protected by the First and Fourteenth Amendments to the Constitution. Second, the Court must identify and evaluate the precise interests asserted by the state, including the legitimacy, strength and necessity of those interests to justify the burdens placed by the statute and by the way in which the statute is applied.

Under these three rulings, *Davis*, *Williams*, and *Anderson*, supra, it is clear that officers clad with authority by the state cannot, as a means of doing wrong forbidden by the Fourteenth Amendment or any other part of the Constitution, accomplish the wrong by the exercise of state power and, at the same time, for the purpose of evading the Constitution, or

avoiding the statutes thereunder, deny they are exercising that power (that is, claim either to be just private citizens exercising First Amendment rights or to be acting solely in "ministerial", that is, innocent or neutral, capacities).

YET APPELLEES HAVE BEEN ENGAGED IN ATTEMPTING PRECISELY TO ACCOMPLISH WRONG FORBIDDEN BY THE CONSTITUTION BY RESORTING TO THIS VERY SUBTERFUGE, A MANEUVER WHICH HAS BEEN CONDEMNED BY REPEATED DECISIONS OF THE SUPREME COURT.

THE ABSENCE OF PUBLISHED STANDARDS AND CRITERIA

Appellees concede that no published standards exist, yet argue that they apply some UNPUBLISHED standards of their own making in selecting, screening and endorsing certain candidates. They thus wish to create the impression that their actions are not entirely arbitrary or that they are based on some proper, prior decisions or majority votes by the mainstream members of the party.

But the courts have repeatedly rejected the absence of statutory standards and criteria which protect against Constitutionally forbidden discrimination and which assure the compliance of the officers of the party with the will of the majority of party members. The courts have condemned such statutes under the "void for vagueness doctrine".

A statute is absolutely and unconditionally "vague" if no standard or criterion whatsoever is published. No person, even of extraordinary intelligence, can then avail himself or herself of the benefits of the statute or avoid its penalties and disabilities. Cases which define the "vagueness" doctrine include: *Connally v. General Construction Co.*, 269 US 3185 (1926); *United States v. Harriss*, 347 US 612 (1954); and *Papachristou v. City of Jacksonville*, 405 US 156 (1972).

ABSENCE OF ALTERNATIVE MEANS OF ACCESS TO BALLOT

Despite the false allegation of Appellees Butterworth, Smith, Mills and Vogt, claiming that Petitioner has access to the primary election ballot by alleged "write-in" provisions, the fact is that there is NO ALTERNATIVE MEANS OF ACCESS WHATSOEVER TO THE FLORIDA PRESIDENTIAL PRIMARY BALLOT. No space is provided on the primary ballot to "write in" the name of the Presidential or Vice Presidential candidate and any effort to "write in" a name automatically defaces and renders void the entire ballot.

The Supreme Court held, in *Lubin v. Panish*, 415 US 709 (1974), involving a primary election case, that the absence of any alternative means of ballot access rendered a California statute unconstitutional.

In *Williams v. Rhodes*, 393 US 23 (1968), the Supreme Court held that the Constitution requires that access

to the ballot and the electorate must be real and not merely theoretical.

Yet in the instant case, no alternate access in any form whatsoever was, is, or will be, available to petitioner, thus violating his, and his constituents', Constitutional rights of Due Process under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Petitioner was denied access to the ballot in 1988.

Because this instant case did not proceed to the Supreme Court before the 1992 meeting of the Presidential Candidate Selection Committee, Petitioner suffered "repetition yet evading review" on January 16, 1992, when he was again denied access to the primary election ballot.

The Florida State Presidential Primary Election law granting a Presidential Candidate Selection Committee the right to act under "cover of state" in determining arbitrarily, without published, prescribed standards, who has ballot access and providing no alternative access to the ballot, is radically and uniquely in conflict with the Constitution of the United States.

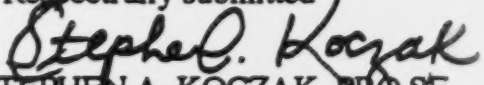
The Florida Presidential Primary Election law denies alternative access to the ballot not only to the Presidential and

Vice Presidential candidates but, consequentially, also to all Florida voters who support those candidates and seek to appear themselves on the primary election ballot as delegates pledged to those Candidates at the respective National Nominating Political Conventions. In the absence of the name of a Presidential or Vice Presidential Candidate on the ballot, the name of a delegate supporting the candidate cannot be printed on the ballot and no space is provided to "write in" the name of a delegate

Thus the Florida Presidential Primary Election Statute Section 103.101 is radically repressive and violates Article II, Section 1 (5), Article IV, Section 2(1) and Article VI, Sections (2) and (3) of, and the First and Fourteenth Amendments to, the Constitution of the United States.

For all the reasons given above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted



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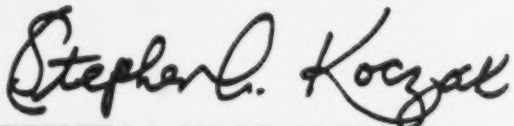
CERTIFICATE OF SERVICE

I hereby certify on March 19, 1992, I placed in the U.S. Postal Service Mail, first class, three copies each of this Petition to George L. Waas, Esquire, Assistant Attorney General, Department of Legal Affairs, THE CAPITOL, Suite 1501, Tallahassee, Florida 32399-1050, Telephone (904) 488-1573 and to John N. French, Esquire, Messer, Vickers, Caparello, French & Madsen, P.O. Box 1876, Tallahassee, Florida 32302-1806, Telephone (904) 222-0720.



STEPHEN A. KOCZAK, PRO SE.

(In compliance with 28 U.S.C. #1746 and as required by Rule 29.5(c), there is being left at the same time as this Petition with the Clerk a further Proof of Service in the form of a separate Notarized Statement.)

APPENDICES

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STEPHEN A. KOCZAK

Petitioner

v.

JIM SMITH,
Secretary of State, State of Florida;
ROBERT A. BUTTERWORTH,
Attorney General, State of Florida
CHARLES WHITEHEAD,
Chairman Florida Democratic Party;
JOHN W. VOGT,
President, Florida Senate;
JON MILLS,
Speaker, Florida House of Representatives

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO. TCA 88-40015-MMP

STEPHEN A. KOCZAK

Plaintiff,

v.

JIM SMITH
Secretary of State, State of Florida,

Defendant.

ORDER

This cause came before the Court on January 15, 1988, for hearing on plaintiff's motion for temporary restraining order and/or preliminary injunction (doc. 3). Plaintiff seeks an order restraining defendant, Secretary of State, State of Florida, from carrying out Florida Statutes, Section 103.101 which provides for certification of those names to be printed on the presidential preference primary ballot in this state. Section 103.101(2)(a) provides, inter alia:

> By December 31 of the year preceding the Florida presidential preference primary, each political party shall submit to the Secretary of State a list of its presidential candidates to be placed on the presidential preference primary ballot or candidates entitled to have delegates appear on the presidential preference primary ballot. The Secretary of State shall prepare and publish a list of the names of the presidential candidates submitted. The Secretary of State shall submit such list of names of presidential candidates to the selection committee on the first Tuesday after the first Monday in January each year a presidential primary election is held. Each person designated as a presidential candidate shall have his name appear, or his delegates' names appear, on the presidential preference primary ballot unless all committee members of the same political party as the candidate agree to delete such candidate's name from the ballot.

At the hearing, defendant argued that plaintiff has failed to join the Democratic Party of Florida as an indispensable party in this cause. The Court agrees. Under Section 103.101, each political party makes a determination of its presidential candidates to be placed on the presidential primary ballot. In this case, plaintiff seeks placement on the ballot as a Democratic candidate. Therefore, it appears to the Court that the Democratic Committee of Florida is a person who must be joined in this action as a party needed for just

adjudication. See Fed. R. Civ. P. 19. Accordingly, plaintiff Koczak is hereby GRANTED LEAVE TO AMEND his complaint to add as a party defendant the Chairman of the Florida Democratic Party. Plaintiff shall immediately serve the same with process pursuant to Rule 4, Federal Rules of Civil Procedure. The Court hereby SCHEDULES a hearing on plaintiff's motion for temporary restraining order and/or preliminary injunction for Tuesday, January 19, 1988 at 11:00 A.M. in Tallahassee, Florida.

DONE AND ORDERED this 15th day of January, 1988.

(signed) Maurice M. Paul
United States District Judge

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

CASE NO. TCA 88-40009-MMP

RICHARD B. KAY,

Plaintiff

v.

JAMES SMITH, Secretary of State, State of Florida;
ROBERT A. BUTTERWORTH, JR., Attorney General, State of Florida;
CHARLES WHITEHEAD, Chairman of Florida Democratic Party,

Defendants.

CASE NO. TCA 88-40015-MMP

STEPHEN A. KOCZAK

Plaintiff

v.

JIM SMITH, Secretary of State, State of Florida,
ROBERT A. BUTTERWORTH, JR., Attorney General, State of Florida;

CHARLES WHITEHEAD, Chairman of Florida Democratic Party,

Defendants.

CASE NO. TCA 88-40016-MMP

CLAUDE KIRK, JR.,

Plaintiff,

v.

CHARLES WHITEHEAD, Chairman, Democratic Party of Florida;
JIM SMITH, Secretary of State, State of Florida;
ROBERT A. BUTTERWORTH, JR., Attorney General, State of Florida:

Defendants.

ORDER

These causes are before the Court on plaintiffs' motions for temporary restraining order or preliminary injunction (doc. l-KAY TCA 88-40009; doc. 7 - Koczak, TCA 88-40015; doc. 3- Kirk, TCA 88- 40016). Plaintiffs seek to restrain or enjoin defendants from carrying into effect Florida Statutes, Section 103.101 which provides for certification of those names to be printed on the presidential preference primary ballot in Florida. Because these cases involve some of the same issues of fact and law, the Court consolidated

them for the purpose of conducting an evidentiary hearing on the aforesaid motions. A hearing was held on January 19, 1988. For the reasons stated herein, the preliminary injunctive relief sought by plaintiffs is DENIED.

In ruling on a motion for preliminary injunction, the Court's discretion is guided by four prerequisites.

> The movant must show: (1) a substantial likelihood that he will ultimately prevail on the merits; (2) that he will suffer irreparable injury, unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest.

Zardui-Quintana v. Richard, 768 F. 2d. 1213, 1216 (11th Cir. 1985). "The preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant 'clearly carries the burden of persuasion' as to the four prerequisites." United States v. Jefferson County, 720 F. 2d. 1511, 1519 (11th Cir. 1983) (quoting Canal Authority v. Callaway, 489 F.2d. 567 (5th Cir. 1974).

Plaintiffs have failed to show a substantial likelihood that they will ultimately prevail when the merits are considered. In support of their instant motions, plaintiffs Kay and Koczak direct the Court's attention to the Final Consent Judgments issued in this District which ordered placement of

their names on prior Florida presidential preference primary ballots. The Court is mindful that these orders expressly withheld any ruling on the constitutionality of Section 103.101 and that the Florida Legislature substantially re-wrote that section since then, thus, both are irrelevant and immaterial to the instant action.

From the evidence adduced at the hearing, the Court finds that the role of the Secretary of State under Section 103.101 is merely ministerial. Unlike earlier versions of the Florida Election Code, the Secretary of State does not make a determination of those names to be placed on the presidential preference primary ballot. Rather, the Secretary is a transmitter of those names supplied by each political party. Fla. Stat. # 103.101 (2)(a). Therefore, plaintiffs grievances are more properly directed to the Florida Democratic Party. The pertinent inquiry in the instant case becomes whether the criteria established by the Florida Democratic Party are so flawed as to deprive plaintiffs of any federal constitutional right.

First, the Court finds that the role of the Florida Democratic Party under Section 103.101 does not rise to the level of state action sufficient to state a claim under the Civil Rights Act. However, the evidence does show that the Florida Democratic Party has promulgated a delegate selection plan which has been approved by the National Democratic Party (State's exh. 1). The testimony of witness Michael Hamby, Executive Director of the Florida Democratic Party, demonstrates that Chairman Charles

Whitehead did not act unilaterally, but as a functionary of the State Executive Committee, in submitting a revised list of candidates to the Secretary of State. That revised list added candidate Gary Hart, a nationally recognized contender who had re-entered the Presidential race.

After consideration of all the testimony and exhibits offered into evidence, the Court concludes that the candidate selection procedures of the Florida Democratic Party are not constitutionally infirm. This Court will not interfere with that Party's plan for selecting candidates to be placed on that Party's presidential preference primary ballot. See Tashjian v. Republican Party of Connecticut, 107 S. Ct. 544 (1986); Democratic Party of United States v. Wisconsin, 101 S. Ct. 1010 (1981). Because plaintiffs have not demonstrated a substantial likelihood of success on the merits, their motions for preliminary injunctive relief are severally DENIED.

The Clerk of the Court is directed to place copies of this order in each of the following files: TCA 88-40009, TCA 88-40015 and TCA 88-40016.

DONE AND ORDERED THIS 19th day of January, 1988.

(signed) Maurice M. Paul
UNITED STATES DISTRICT JUDGE

APPENDIX 3

IN THE UNITED STATES DISTRICT COUR FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STEPHEN A. KOCZAK
Plaintiff,

v. CASE NO. TCA 88-40015-MMP

JIM SMITH, Secretary of
State, State of Florida,
et al.,
Defendants.

ORDER and NOTICE

A status conference was held on August 31, 1988. Plaintiff is granted leave to file an amended complaint within 10 days of the status conference. All parties shall file any responses or motions, including motions and responses for summary judgment, within 40 days of the status conference.

Any motions for summary judgment will be taken under advisement by the court on October 15, 1988. Because the Court does not plan to schedule a hearing on the motions, the parties are directed to file sworn affidavits or other materials in opposition to any summary judgment motion on

or before October 15, 1988. See Fed. R. Civ. P. 56 (c); Moore v. State of Florida, 703 F. 2d 516 (11th Cir. 1983). The parties are advised that failure to file sworn affidavits or other materials in opposition to an opponent's summary judgment motion may be sufficient cause for granting the motion by default, that is, accepting as truth the movant's uncontradicted evidence and entering final judgment in favor of the movant without a full trial or any further proceedings. See Brown v. Shinbaum, 828 F.2d 707 (11 Cir. 1987); Griffith v. Wainwright, 772 F.2d 822 (11th Cir. 1985).

DONE AND ORDERED this 16th day of September 1988.

(signed) Maurice M. Paul

United States District Judge

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STEPHEN A. KOCZAK
Plaintiff,

v. CASE NO. TCA 88-40015-MMP

JIM SMITH, Secretary of State, State of Florida,
et al.,
Defendants

FINAL SUMMARY JUDGMENT

For the reasons set forth in this court's order of January 19, 1988, final summary judgment is hereby entered in favor of the defendants, James Smith, Secretary of State, State of Florida, Charles Whitehead, Chairman of the Florida Democratic Party, JOHN W. VOGT, President, Florida Senate, and JON MILLS, Speaker, Florida House of Representatives, and against the plaintiff, Stephen A. Koczak. Costs to be awarded upon proper motion.

DONE AND ORDERED this 24th day of May, 1989.

(signed) Maurice M Paul
United States District Judge

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO. TCA 88-40015

REFERRAL AND ORDER

STEPHEN A. KOCZAK
v.
JIM SMITH, et al.

Referred to Judge Paul on 6-30-89

Type of Motion/ Pleading MOTION TO STAY, RECONSIDER FINAL SUMMARY JUDGMENT BECAUSE OF ERRORS OF FACT LEADING TO CONSEQUENT ERRORS IN LAW; REQUEST FOR REVIEW BY THREE-JUDGE COURT AND ORAL ARGUMENT

Filed by Pltf. on 6/5/89 Doc. No. 34

MARVIN S. WAITS, Clerk

By: Ginger Channing
Deputy Clerk

ORDER OF THE COURT

On the foregoing it is ORDERED this 7th day of July 1989:

The Relief Requested is DENIED

(X) by this order.

(signed) Maurice M. Paul
United States District Judge

Copies mailed to
Koczak
Waas
on 7-10-89 By GC

APPENDIX 6

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89-3665
Non-Argument Calendar

STEPHEN A. KOCZAK
Plaintiff-Appellant

versus

JIM SMITH, Secretary of State
State of Florida
Defendant-Appellee

ROBERT A. BUTTERWORTH, Attorney General, State of Florida;
CHARLES WHITEHEAD, Chairman Florida Democratic Party;
JOHN W. VOGT, President Florida Senate; and
JON MILLS, Speaker, Florida House of Representatives,
Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Florida

(June 25, 1991)

Before EDMONDSON, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

Assuming for the sake of argument that defendants have acted under color of state, plaintiff has failed to show a deprivation of a protected federal right. The pertinent entire election process does not fail to afford fundamental fairness. The district court did not abuse its discretion in denying a preliminary injunction because there was little likelihood of success on the merits.

AFFIRMED.

APPENDIX 7

IN THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No. 89-3665
STEPHEN A. KOCZAK
Plaintiff-Appellant

versus

JIM SMITH, Secretary of State, State of Florida
Defendant-Appellee,
ROBERT BUTTERWORTH, Attorney General
CHARLES WHITEHEAD, Chairman
Florida Democratic Party;
JOHN W. VOGT, Pres. Florida Senate;
and JON MILLS, Speaker,
Florida House of Representatives
Defendants

Appeal from the United States District Court
for the Northern District of Florida

ON PETITION FOR REHEARING
(JUNE 25, 1991)

Before EDMONDSON, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by Appellant Stephen A. KOCZAK is DENIED.

ENTERED FOR THE COURT:

(signed) J. L. Edmondson

UNITED STATES CIRCUIT JUDGE

APPENDIX 8

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3665

STEPHEN A. KOCZAK
Plaintiff-Appellant

versus

JIM SMITH, Secretary of State,
State of Florida,
Defendant-Appellee,
ROBERT BUTTERWORTH, Attorney General
CHARLES WHITEHEAD,
Chairman, Florida Democratic Party,
JOHN W. VOGT, Pres. Florida Senate
ETC., ET AL.,
Defendants

On Appeal from the United States District Court for the
NORTHERN DISTRICT OF FLORIDA

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion June 25, 1991, 11th Cir., 1991 ___F.2d____)

Before: EDMONDSON, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

ENTERED FOR THE COURT:

(signed) J.L. Edmondson

UNITED STATES CIRCUIT JUDGE

APPENDIX 9

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89-3665

STEPHEN A. KOCZAK

Plaintiff-Appellant

JIM SMITH, Secretary of State, State of Florida,

Defendant-Appellee

ROBERT BUTTERWORTH, Attorney General,
CHARLES WHITEHEAD, Chairman, Florida Democratic Party,
JOHN W. VOGT, President, Florida Senate
JON MILLS, Speaker, Florida House of Representatives,

Defendants

On Appeal from the United States District Court for the Northern District of Florida

ORDER:

(X) The motion of Appellant for stay of the mandate pending petition for writ of certiorari is GRANTED to and including 20 March 1992, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the

Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk within that time.

(signed) J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

APPENDIX 10
CHRONOLOGY OF FACTS

Stephen A. Koczak, Petitioner, is a "natural born citizen" of the United States, and having been born November 13, 1917 in Trenton, New Jersey had "attained to the age of thirty-five years" when he sought admittance to the Florida Presidential Preference Primary Ballot in 1988. Thus he had met the only qualifications, under the United States Constitution, Article II, Section 5, required of a United States citizen to be "eligible to the office of President."

Koczak was a legal resident in 1987 and 1988 at 261 Ashmore Avenue, Trenton, 10, New Jersey and a registered Democrat in Trenton South Ward Precinct 10, Mercer County, New Jersey.

(Note: When a legal resident of Washington, D. C., Koczak had previously sought the office of President in Primary elections held in 1984 and had been admitted to the ballot in the States of New Hampshire, Louisiana and Florida. His admission in Florida was on the basis of Final Consent Judgment by DC Judge William Stafford on January 31, 1984.)

Koczak had been certified to the Federal Election Commission, December 11, 1987 as a Democrat candidate for President.

Koczak already had been admitted to the ballot for 1988 Presidential Primary elections in three states, namely New Hampshire (election scheduled, February 16, 1988), Missouri and Oklahoma (both elections scheduled for March 8, 1988) when he applied on January 4, 1988 to be placed on the Florida Presidential Preference Primary ballot.

Koczak had been informed by the office of Jim Smith, Florida Secretary of State on January 4, 1988 to speak also to Charles Whitehead, Chairman, Florida Democratic Party.

Koczak spoke on January 4, 1988 to Charles Whitehead informing him of Koczak's candidacy and decision to campaign in Florida.

Koczak was notified by the Secretary of State Smith that the latter had placed Koczak's name before the Selection Committee but that his name had been deleted.

Koczak, acting Pro Se, filed complaint, TCA 88-40015, on January 14, 1988, against the Secretary of State for denying him access to the ballot.

Judge Maurice Paul ruled that the Chairman, Florida Democratic Party, had to be added as a defendant.

Judge Maurice Paul on January 19, 1988 denied preliminary injunction on the grounds that the role of the Secretary of State was purely "ministerial" and the "role of the Florida Democratic Party under Section 103.101 does not

rise to the level of state action sufficient to state a claim under the Civil Rights Act."

Koczak notified by Secretary of State that latter moved for dismissal and summary judgment on grounds his own role was purely "ministerial" .

Koczak amended complaint on September 12, 1988 adding as defendants John W. Vogt, President, Florida State Senate and Jon Mills, Speaker, Florida House of Representatives.

Koczak was notified that defendant, Jon Mills, Speaker, Florida House of Representatives had moved identical defense as defendant Smith, to wit, that Jon Mills' role in Selection Committee was purely "ministerial".

Koczak was notified that defendant, John W. Vogt, President, Florida State Senate, had moved identical defense as defendant Smith, to wit, that John Vogt's role in Selection Committee was purely "ministerial."

District Court Judge Maurice M. Paul, "(F)or the reasons set forth in this court's order of January 19, 1988", issued final summary judgment on May 24, 1989 in favor of all the defendants, including JOHN VOGT, President, Florida Senate and JOHN MILLS, Speaker, Florida House of Representatives. **YET THE CLAIMS OF VOGT AND MILLS THAT THEY WERE ACTING SOLELY AND PURELY IN A "MINISTERIAL" ROLE HAD NEVER BEEN EXAMINED, LET ALONE, ESTABLISHED**

PREVIOUSLY BY JUDGE PAUL AT ANY TIME DURING THE SIXTEEN MONTHS THAT THIS CASE WAS BEING LITIGATED THERE.

Koczak, citing facts **not heard** by Judge Paul, including issue of roles of John Vogt and Jon Mills, moved for stay, reconsideration because of "errors of fact leading to consequent errors in law", review by three-judge court and oral argument. Judge Paul denied Koczak's motions on July 7, 1989.

Koczak filed appeal on August 2, 1989.

Appellate Court ruled Per Curiam on June 25, 1991 as follows: "Assuming for the sake of argument that defendants acted under color of state, plaintiff has failed to show a deprivation of a protected federal right....."

Seeking a clarification of the meaning and context of why and how he "has failed to show a deprivation of a protected federal right", Koczak asked for a rehearing on the grounds that "color of state" violated his Constitutional rights whether or not it violated his rights as a "protected class" under the Civil Right Act. On September 27, 1991, the Court, Per Curiam, replied only, "The petition for rehearing filed by Appellant, Stephen A. Koczak, is DENIED".

Koczak filed a petition/suggestion for rehearing *en banc*.. On December 20, 1991, the Court denied the petition-/suggestion.

On January 23, 1992, the Court granted a Stay of Mandate "to and including 20 March 1992".

Supreme Court, U.S.
FILED
APR 20 1992
OFFICE OF THE CLERK

(2)

NO. 91-1507

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STEPHEN A. KOCZAK

Petitioner

v.

JIM SMITH,
Secretary of State, State of Florida;
ROBERT A. BUTTERWORTH,
Attorney General, State of Florida;
CHARLES WHITEHEAD,
Chairman Florida Democratic Party;
JOHN W. VOGT,
President, Florida Senate;
JON MILLS
Speaker, Florida House of Representatives;

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Mark S. Levine
245 East Virginia Street
Tallahassee, Florida 32301
(904)222-6580

40

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QUESTIONS PRESENTED

This Brief in Opposition will address the questions presented in Petitioner's Petition for Writ of Certiorari.

INTERESTED PARTIES

Pursuant to Rule 15 of the Supreme Court of the United States, below are the names and titles of the interested parties:

JAMES SMITH, Secretary of State, State of Florida

ROBERT A. BUTTERWORTH, Florida Attorney General

JOHN W. VOGT, President Florida Senate

JON MILLS, Speaker, Florida House of Representatives

CHARLES WHITEHEAD, Ex-Chairman, Florida Democratic Party

GEORGE L. WAAS, Attorney with the office of the Florida Attorney General, Civil

Division, Counsel for Appellee Smith, and Defendants Vogt and Mills.

JOHN H. FRENCH, JR., Counsel for Defendant Whitehead

STEPHEN A. KOCZAK, Plaintiff/Appellant/Petitioner

THE HONORABLE FEDERICO A. MORENO, United States District Court Judge, Miami Division, Southern District

THE HONORABLE MAURICE M. PAUL, United States District Court Judge, Tallahassee Division, Northern District of Florida

ELEVENTH CIRCUIT JUDGES EDMONDSON, BIRCH and DUBINA

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CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED IN THE CASE

UNITED STATES CONSTITUTION

ARTICLE II, SECTION 1(5)

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years and been fourteen years a resident within the United States.

ARTICLE IV, SECTION 2(1)

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

ARTICLE VI, SECTIONS (2) AND (3)

(2)This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

(3)The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or trust under the United States.

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT, SECTION ONE

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA STATUTES

CHAPTER 103 Section 103.101 **Presidential preference primary.**

(2)There shall be a Presidential Candidate Selection Committee composed of the Secretary of State, who shall be a nonvoting chairman; the Speaker of the House of Representatives; the President of the Senate; the minority leader of each house of the Legislature; and the chairman of each political party required to have a presidential preference primary under this section.

(a)By December 31 of the year preceding the Florida presidential preference primary, each political party shall submit to the Secretary of State a list of its presidential

candidates to be placed on the presidential preference primary ballot or candidates entitled to have delegates appear on the presidential preference primary ballot. The Secretary of State shall prepare and publish a list of the names of the presidential candidates submitted. The Secretary of State shall submit such list of names of presidential candidates to the selection committee on the first Tuesday after the first Monday in January each year a presidential preference primary election is held. Each person designated as a presidential candidate shall have his name appear, or have his delegates' names appear, on the presidential preference primary ballot unless all committee members of the same political party as the candidate agree to delete such candidates name from the ballot....

(b)Any presidential candidate whose name does not appear on the list submitted to the Secretary of State may request that the selection committee place his name on the ballot. Such request shall be made no later than the second Tuesday after the first Monday in January.

RULES OF THE SUPREME COURT

Rule 10

Considerations Governing Review on Writ of Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion,

indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

NO. 91-1507

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STEPHEN A. KOCZAK

Petitioner

v.

JIM SMITH,
Secretary of State, State of Florida;
ROBERT A. BUTTERWORTH,
Attorney General, State of Florida;
CHARLES WHITEHEAD,
Chairman Florida Democratic Party;
JOHN W. VOGT,
President, Florida Senate;
JON MILLS,
Speaker, Florida House of Representatives;

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Mark S. Levine
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CITATIONS OF COURT ORDERS AND DECISIONS

1) Order by Judge Maurice M. Paul, January 19, 1988, Case No.: TCA 88-40015-MMP

2) Final Summary Judgment by Judge Maurice M. Paul, May 24, 1989, Case No.: TCA 88-40015-MMP

3) Order Denying Reconsideration by Judge Maurice M. Paul, July 7, 1989, Case No.: TCA 88-40015-MMP

4) Affirmed, Per Curiam, by United States Court of Appeals Case No. 89-3665

5) Order Denying Petition for Rehearing, Per Curiam, by Honorable J. L. Edmondson, June 25, 1991, Case No. 89-3665

6) Order Denying Petition for Rehearing En Banc, Per Curiam, by Honorable J. L. Edmondson, June 25, 1991, Case No.: 89-3665

7) Order Granting Appellants' Motion for Stay by Honorable J. L. Edmondson, January 23, 1992, Case No.: 89-3665

JURISDICTIONAL GROUNDS

The order and opinion of the Court of Appeals denying timely petition for review en banc was entered on December 20, 1991, reaffirming orders and opinions of September 27, 1991, and June 25, 1991.

The statutory provision that confers jurisdiction on this Court to review this case by writ of certiorari is 28 U.S C. #1254(1). Petition is submitted under Rule 10 of the Rules of the Supreme Court of the United States.

STATEMENT OF CASE

The basis for federal jurisdiction in the court of first instance if action was taken under "color of state law," would be the United States Constitution, Articles II, IV, and V, Amendments One and Fourteen; Title 42 USC Sections 1983, 1985, 1986, 1981 et

seq. and 1973; and Title 28 USC Sections 1331 and 1343. However, there is a long line of precedent that stands for the proposition that political parties have the right to determine and enforce the qualifications of members and candidates through self-governance.

Florida Statutes mandate the existence of a Presidential Candidate Selection Committee comprised of three Republican leaders, three Democratic leaders and the Secretary of State. In actual operation, the three Republican leaders submit the list of Republican candidates to be placed on the primary and the three Democratic leaders submit the list of Democratic candidates to be placed on the Primary Ballot. The State in Section 103.101(2)(c), Florida Statutes, allows a Presidential candidate whose name does not appear on the list to request the

selection committee to reconsider placing the name on the ballot.

Additionally, the Petitioner's allegations that there are no alternative means of access to the Presidential Primary, therefore assuring state action is not founded on any legal precedent. In fact, the most recent cases have held that there is no fundamental right to primary participation. Consumer Party v. Davis, 633 F.Supp. 877,888 (E.D. Pa. 1986); see also, American Party of Texas v. White, 15 U.S. 767, 781 (1974). The State of Florida provides an independent candidate route as an "alternative to being nominated in one of the direct party primaries." Storer v. Brown, 415 U.S. 7824,733 (1974). The candidate can also organize and campaign outside the parameters of the Republican and Democratic Party's for access to the general ballot. Such

reasonable alternatives have been ruled constitutionally valid and in no way violative of the persons constitutional rights. The decisions of the United States District Courts and United States Court of Appeals are in accordance with the decisions of other United States Courts of Appeal and with the United States Supreme Court. Additionally, Charles Whitehead is no longer the State Chairman of the Florida Democratic Party. Simon Ferro now holds the position of State Chairman of the Florida Democrtic Party and as such has an interest in this preceeding. Counsel for Simon Ferro is Mark S. Levine, who has filed this Brief in Opposition on his behalf.

SUMMARY OF ARGUMENT

A review by Writ of Certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be

granted only when there are special and important reasons therefor. Rules of the Supreme Court, Rule 10. The case at bar poses no special and important reasons significant to allow this Court to grant the Writ for Certiorari. Section 103.101, Florida Statutes, has been upheld by two separate United States District Courts. Judge Paul of Northern District of Florida, U. S. District Court, Case No.: TCA 88-40015-MMP (N.D. Fla. 1988), held the provisions constitutional in 1988 and most recently in January, 1992. Judge Moreno, United States District Court for the Southern District of Florida, Case No.: 0-134-CIV-Moreno (S.D. Fla 1992), also upheld the validity of the State Statute. Both courts also found no state action on the part of the Presidential Selection Committee actors. The courts held that the actions of the Committee were not

taken "under color of state law," and therefore, Plaintiffs had failed to establish a cognizable claim under 42 U.S.C. ss 1983 and 28 U.S.C. ss 2201 and 2202, challenging the constitutionality of Section 103.101, Florida Statutes.

The rulings of these two United States District Courts of Appeal are in accordance with other decisions. The plethora of case law supports the findings of these two Courts and the affirmation by the United States Court of Appeals and said case law will be discussed at length in this Brief in Opposition. Therefore, this Court should deny said Petition since the considerations of Rule 14 of the Rules of the United States Supreme Court are not met.

ARGUMENT

A. There Is No Conflict In Decisions

1. Recent Opinions

In Kay v. Smith, Case No. 40009-MMP (N.D. Fla. 1988), the United States District Court for the Northern District of Florida decided a case substantially similar to the one at Bar. In Kay and the cases with which it was consolidated, the plaintiffs sued the Secretary of State of Florida and the Chairman of the Democratic Party of Florida, because the Plaintiffs were excluded from the presidential preference primary ballot in 1988. The plaintiffs sought an injunction. In the Court's Order denying the Plaintiffs' Motion for Preliminary Injunction, Judge Maurice Paul stated: "The Court finds that the role of the Florida Democratic Party under Section 103.101 does not rise to the

level of state action sufficient to state a claim under the Civil Rights Act. However, the evidence does show that the Florida Democratic Party has promulgated a delegate selection plan which has been approved by the National Democratic Party....Chairman Charles Whitehead did not act unilaterally, but as a functionary of the State Executive Committee, in submitting a revised list of candidates to the Secretary of State. That revised list added candidate Gary Hart, a nationally recognized contender, who had re-entered the presidential race. After consideration of all the testimony and the exhibits offered into evidence, the Court concludes that the candidate selection procedures of the Florida Democratic Party are not constitutionally infirm. This Court will not interfere with that Party's plan for selecting candidates to be placed on that Party's presidential

preference primary ballot. See Tashjian vs. Republican Party of Connecticut, 107 S.Ct. 544 (1986), Democratic Party of the United States vs. Wisconsin, 101 S.Ct. 1010 (1981).

Judge Paul's Order was affirmed by the Eleventh Circuit Court of Appeals. On January 21st, 1992, the United States District Court for the Northern District of Georgia issued its Order in Duke vs. Cleveland, Case No. 1:92-CV-116-RCF (N.D. Ga. 1992). The Plaintiff sought a Temporary Restraining Order and Preliminary Injunction enjoining the Defendants from printing the Republican Primary Ballot without including David Duke's name.

The District Court denied the Plaintiffs' Motion for Injunction Relief. The District Court found: (1) The Plaintiffs "failed to show the Court that a First Amendment right exists, which guarantees

access to a party's primary ballot (in direct contravention of the Party's stated desires): (2) The Plaintiffs failed to persuade the Court that the Party representatives in the Presidential Candidate Selection Committee were state actors when they cast their vote against the inclusion of David Duke on the primary ballot; and (3) There was a grave possibility of damage to the political process by forced association of the Republican Party of Georgia with the Plaintiff. Id. at 6, 10-11. The District Court stated that there was no right to be included on a political party's primary ballot. The Court also cited Eu vs. San Francisco City Democratic Central Committee, 489 U.S. 214 (1989) for the proposition that a political party has the right to determine those who constitute the association, to select a "standard bearer," and determine the

process by which its leaders are elected.

As recent as January 30, 1992, Judge Moreno of the United States District Court of the Southern District of Florida, David Duke, et al. vs. Jim Smith, Secretary of State, et al., Case No. 0134-CIV-MORENO (S.D. Fla. 1992), denied the Plaintiffs' demand for a temporary injunction basing his opinion on the "long line of precedent that stands for the proposition that political parties have the right to determine and enforce the qualifications of members and candidates through self-governance." The Plaintiffs' were seeking placement on the presidential preference primary ballot of the Democratic and Republican parties in the State of Florida. The Court found that "the state action issue was the threshold question in this case." Judge Moreno stated that: The fact that the Florida Statutes mandate

the existence of a Presidential Candidate Selection Committee, currently comprised of three Republican leaders, three Democratic leaders and the Secretary of State, does not transform that Committee from internal party proceedings to state action....Allowing Plaintiffs any opportunity to interfere with the internal functions and decisions of the political parties would be a violation of the parties own rights of association.

2. Other Cases

A long line of precedent stands for the proposition that political parties have the right to determine and enforce the qualifications of members and candidates through self governance and the state cannot interfere with this power. In Ripon Society vs. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975), the United States Court of Appeals for the District of Columbia Circuit

eloquently expressed this idea: "[A] Party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interest, deserves the protection of the Constitution as much, if not more, than its condemnation. The express constitutional rights of speech and assembly are of slight value indeed if they do not carry with them a concomitant right of political association. Speeches and assemblies are, after all, not ends in themselves but means to affect change through the political process. If that is so, there must be a right no only to form political associations, but to organize and direct them

in the way that will make them most effective. Id. at 585.

The Constitution and Bill of Rights protect these organizations from unwarranted government intrusion and interference. "[A] State, or a court may not constitutionally substitute its own judgment for that of the Party...and as is true of all expressions of First Amendment freedoms, the Court may not interfere on the ground that they be particular expression as unwise or irrational." Democratic Party of the United States vs. Wisconsin, 450 U.S. 107, 123-124 (1981). In Tashjian vs. Republican Party of Connecticut, 479 U. S. 28 (1986), the United States Supreme Court held a statute unconstitutional on First Amendment grounds because it restricted political parties rights of association. The Republican Party of Connecticut wanted to allow participation

in its primaries even though they had only recently registered as republicans. The state forbade participation of such recent registrants. The Supreme Court decided that such interests were greatly outweighed by the political party's right to associate with those of its choosing. The Court stated, "The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." Id. at 224. In 1983, the Eleventh Circuit Court of Appeals upheld a political party's right to choose the method by which it would select delegates to the party's national convention, See Wymbs vs. Republican State Executive Committee of Florida, 719 F.2d 1072 (11th Cir. 1983). Even though the plaintiffs alleged the party's delegate selection process violated the right to equal

representation and equal participation, the Court sustained the political party's right to govern itself free from government intrusion. A long line of cases support the Respondent's position that the decision to exclude Stephen Koczak from the Democratic Party primary does not violate Koczak's constitutional rights.

3. In the Contest of a Primary Election, the Constitutional Rights of the Party and its Members are Paramount

While the voters' rights to vote may be paramount in the context of a general election, the United States Supreme Court has held that denying an individual the opportunity to vote for a candidate in a primary election does not infringe on the voters' right of freedom of association. Rosario vs. Rockefeller, 417 F. Supp. 837, 846-47 (D. Conn.), Aff'd mem., 429 U. S. 989

(1976). However, the Democratic Party of Florida's own right to association and those of its members would be infringed upon the Plaintiffs intended intrusion into the Party's candidate selection process. See Nader vs. Schaffer, 417 F.Supp. 837, 846-47 (D.Conn.), Aff'd mem., 429 U.S. 989 (1976).

Numerous courts have recognized the fundamental differences between primary elections, in which the parties select their candidates in general elections, in which the people choose their representatives. See Belluso vs. Poythress, 485 F.Supp. 904 (N.D. Ga. 1980), Cross vs. Fong Eu, 430 F.Supp. 1036 (N.D. Cal. 1977).

Therefore, this Respondent respectfully submits that the Parties are entitled to conduct its primary election free from the Plaintiffs intrusion and infringement of the

Constitutional rights of the Party and its members.

4. Petitioner's Right to the Equal Protection of the Laws Has Not Been Violated by the Defendants' Actions

There is no fundamental right to run for public office. The United States Supreme Court has refused to recognize such a right. Bullock vs. Carter, 405 U.S. 134 (1973). See also Adams vs. Askew, 511 F2d 700 (5th Cir. 1975); Joseph vs. City of Birmingham, 510 F.Supp. 1319 (E.D. Mich. 1981); Clough vs. Guzzi, 416 F.Supp. 1057 (D. Mass. 1976); Blassman vs. Markworth, 359 F.Supp.1 (D.J11.1973); Walter vs. Yucht, 352 F. Supp. 85 (D.Del.1972). Nor is there any constitutional right to primary participation. Consumer Party vs. Davis, 633 F. Supp. 877, 888 (E.D. Pa. 1986). See also American Party of Texas vs. White, 41 U.S. 767, 781 (1974). Furthermore, there are no

allegations which suggest that Stephen Koczak is a member of a suspect class protected by the equal protection laws. See San Antonio School Dist. vs. Rodrigues, 411 U. S. 1, 28 (1976).

In the absence of the implication of a fundamental right or a suspect classification -- which is clearly not involved here -- an action is measured by the criterion of mere rationality. See Joseph, 510 F.Supp. at 1328; Belluso vs. Poythress, 485 F.Supp. 904, 910 (N.D. Ga 1980). Interests in limiting the size of the ballot to minimize voter confusion and to preserve the integrity of the process have passed constitutional muster. See American Party, Consumer Party. Therefore, Petitioner's rights to the equal protection of the laws has not been violated by the Defendant's action.

The cases are clear in finding that a Plaintiff would not be prejudiced if the Plaintiff retained the opportunity to be listed on the general election ballot as an independent candidate. In Cross vs. Fong Eu, 430 F. Supp. 1036 (N.D. Cal. 1977), the Plaintiff claimed she was prejudice when she was excluded from running in a California party primary. The Court held her allegations clearly did not state a claim for relief, either based upon constitutional principles or otherwise. Furthermore, the Plaintiffs First Amendment rights are not violated as "Plaintiffs have cited no law which prevents them from organizing or campaigning outside the parameters of the Republican Party primary and any candidates absent from the primary ballot in no way prevents them from accessing the general ballot. Order, Duke v. Cleveland, p.5.

Like California, Florida provides an adequate independent candidacy route as "an alternative to being nominated in one of the direct party primaries." Any injury alleged by the Plaintiff could be redressed simply by having the proposed candidate register as an independent candidate for office, pursuant to Section 99.0955, Florida Statutes. Alternatively, the individual could register as a "minor party candidate," pursuant to Section 99.096, Florida Statutes. These sections provide a constitutionally permissible alternative to the plaintiff participating in the democratic presidential preference primary. Jenness vs. Fortson, 403 U.S. 431 (1971).

Members of the public who wish to vote for Stephen Koczak still have the option of sponsoring Koczak as a candidate on the Florida general election ballot. The

supporters of Koczak can organize a political party for those who share Koczak's beliefs. Therefore, the Democratic Party has not harmed the public from precluding Koczak from running in the Party's presidential primary. In fact, the Democratic Party of Florida's decision is clearly consistent with principles that have provided for fair, competitive, and meaningful elections in our nation for more than 200 years. On this ground as well, the Petition for Writ of Certiorari should be denied.

III. CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

DATED this 16th day of April, 1992.

Respectfully Submitted,

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(904)222-6580

Florida Bar #256617
ML-3112

Attorney for Simon Ferro,
State Chairman of the
Florida Democratic Party

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to GEORGE L. WAAS, Esquire, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050; JOHN N. FRENCH, Esquire, Messer, Vickers, Caparello, French & Madsen, P. O. Box 1876, Tallahassee, Florida 32302-1806; and STEPHEN A. KOCZAK, Pro Se, 2932 Macomb Street, N.W., Washington, DC 20008; by U. S. Mail on this 16th day of April, 1992.

MARK S. LEVINE, ESQUIRE

Supreme Court, U.S.
FILED
MAY 13 1992
OFFICE OF THE CLERK

(3)

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Speaker, Florida House of Representatives

Respondents

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Stephen A. Koczak, *Pro Se*
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QUESTIONS PRESENTED

1. Whether the decision of the U.S. Appeals Court for the Eleventh Circuit upholding Florida Statute Chapter 103, Section 103.101 (2) (a) and (b) which provides for the exclusive selection for primary ballot access of candidates acceptable to a statutory committee and which provides no alternate access whatsoever to the Florida presidential primary ballot is in conflict with prior Supreme Court decisions, including *Lubin v. Panish*, 415 U.S. 709 (1974)?

2. Whether, the Florida Statute Chapter 103, Section 103.101(2)(a) and (b), is constitutional in light of Supreme Court decisions, including *Democratic Party of the United States v. Wisconsin,*101 S. Ct. 1010 (1981), 450 U.S. 107 (1981) and *Tashjian v. Republican Party,* 107 S. Ct. 544 (1986) prohibiting state action and intervention in partisan political party internal affairs?

3. Whether, there being no alternative access to the ballot, the actions of the Presidential Candidate Selection Committee are state action as a "pre-primary" held by a small statutory "insider" group accountable only to itself in violation of the First and Fourteenth Amendments and the Civil Rights laws?

4. Whether the Florida Attorney General, by officially representing in the courts the Speaker of the Florida House of Representatives and the President of the Senate as

members of the Presidential Candidate Selection Committee establishes and confirms that the participation of these members of the State Legislature constitute state action of that Committee?

5. Whether the activities of the Florida Presidential Candidate Selection Committee (composed of the Secretary of State, a member of the executive branch; the President of the Senate and the Speaker of the House of Representatives, members of the legislative branch; and a member of a partisan political party) are state actions violating the separation of powers clauses of the United States and Florida constitutions?

6. Whether the Florida Legislature can constitutionally create for, or delegate to, any of its own members, the right to intervene ex officio as legislators in internal partisan political party affairs to approve or disapprove the names of candidates and delegates for a presidential primary election?

7. Whether the United States District Court for the Northern District of Florida, Tallahassee Division, and the United States Appeals Court for the Eleventh Circuit rendered judgments in conflict with United States Supreme Court decisions and departed from the usual course of judicial proceedings by failing to give close scrutiny to the facts in this case?

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INTERESTED PARTIES

To assist in the consideration of this appeal and pursuant to Rule 14 of the Supreme Court of the United States, there appear below the names and titles of the parties who were involved in the events leading to this case and have an interest in this outcome of this petition:

JAMES SMITH, Secretary of State, State of Florida

ROBERT A. BUTTERWORTH, Florida Attorney General

JOHN W. VOGT, President, Florida Senate

JON MILLS, Speaker, Florida House of Representatives

CHARLES WHITEHEAD, Chairman, Florida Democratic Party

GEORGE L. WAAS, Attorney with the office of the Florida Attorney General, Civil Division, Counsel for Appellee Smith, and Defendants Vogt and Mills

JOHN H. FRENCH, JR., Counsel for Defendant Whitehead

STEPHEN A. KOCZAK, Plaintiff/Appellant/ Petitioner

THE HONORABLE MAURICE M. PAUL, United States District Court Judge, Tallahassee Division, Northern District of Florida

ELEVENTH CIRCUIT JUDGES EDMONDSON, BIRCH and DUBINA

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STATEMENT OF THE CASE

Petitioner invites the attention of the Justices of this Court to the most recent maneuver by the Respondents to alter and distort radically the presentation, through suppression, of the facts and the law so as to deceive the members of this Court as to the realities underlying this Petition.

Not wishing to address the seven "QUESTIONS PRESENTED", the Respondents have undertaken to evade all the issues raised in those "QUESTIONS PRESENTED". They have chosen, instead, to confront the court with a set of extraordinary circumstances resulting in the falsification of the procession, priority and hierarchy of their legal status as Respondents before this Court.

Four of the five respondents named by Petitioner, precisely those four who had appeared as Appellees before the Appeals Court, Eleventh Circuit, have decided not to appear before this Court. They want the Court to condone their claim that they do not exist as Respondents, that they have nothing to do with this case. Yet they have chosen to do so without an express waiver to appear. They have decided to let the time expire, as if thereby they were exculpated by oblivion from all their violations of the Constitutional rights of the Petitioner and of the generality of the members of the Florida Democratic Party.

The one Respondent who has come forward, the State Chairman of the Florida Democratic Party, did **not** appear as an Appellee before the Appeals Court Eleventh Circuit. Moreover that Respondent is involved only incidentally in most of the issues presented by this Petition. Thus the central issues of this Petition are being circumvented by the Respondents and other issues totally unrelated, fictitious and extraneous are being substituted by intention and design.

In light of these circumstances, Petitioner raises the question whether there exists an understanding and a collaboration between the office of the Florida Attorney General and Esquire Mark S. Levine to reverse their roles? That is, is there an agreement among them to evade and avoid the issues before this Court by replacing the office of the Department of Legal Affairs of the State of Florida, representing the four principal Respondents ,with the attorney for the Florida Democratic Party as the sole Respondent? Is this to conceal from the Supreme Court the roles of the four principal Respondents?

This would appear to be the case.

For example, in the Brief in Opposition submitted by Esquire Levine, there is not a single reference either to the President of the Florida Senate, to the Speaker of the Florida House of Representatives nor even to the Secretary of State of the State of Florida nor to the Florida Attorney General.

This extraordinary omission, a major tour de force over more than twenty pages of text, was accomplished despite the fact that the Florida Statute at issue, cited by both

the Petitioner and by the Attorney for the Florida Democratic Party explicitly names four Florida State officials as members of the Presidential Candidate Selection Committee!! Yet, in his entire Brief, Esquire Levine avoids taking note of the explicit language of the very statute he pretends to defend.

CENTRALITY OF THE "QUESTIONS PRESENTED"

Petitioner reiterates and stresses that four of the seven "QUESTIONS PRESENTED" by him relate specifically and exclusively to the activities of the Florida State officials whose conduct involved interference with, and intrusion into, the rights of the general membership of the Florida Democratic Party. The remaining three "QUESTIONS PRESENTED" are rooted in these four.

In formulating his complaints and framing his "QUESTIONS PRESENTED", Petitioner has sought to have the Courts treat his litigation, now in its fifth year, as an effort to define the boundaries between the following categories of legal considerations: the rights of the State as such; the rights of officers of the State (such as members of Legislatures) to act as automatic ex officio party leaders in deciding who may and may not have ballot access; the appropriate rights of any temporary but internally elected political party leadership (such as the State Chairman of the Florida Democratic Party) over against the rights of the party general membership in determining who has primary election ballot access so that all party members (and not merely the leadership) can exercise their rights to select the party candidates and delegates of their choice; and, in the specific

case of Presidential primaries, the rights of persons accepted as members of the same party in other States, and acknowledged by the National Party as members, to have those rights recognized (or denied) well in advance by some previously published standard in the State in which the candidate seeks to participate in the primary election; and, finally, the prospect of an alternative means of ballot access.

All these issues are involved in the "QUESTIONS PRESENTED" by the Petitioner and in his raising such issues as the roles of members of the Florida Legislature, the conduct of the Attorney General, the absence of published standards and criteria, the absence of alternative access to the ballot and, equally serious, the indifference of the District and Appellate Courts in closely scrutinizing the components of this new legislation enacted in 1986 and not previously subjected to judicial review.

Thus this suit concerns not only Petitioner's own Constitutional rights but the Constitutional rights of all Florida Democratic Party members as they sought, and will need to seek, to exercise their own Constitutional rights in future Florida Presidential primary elections when they are confronted with the claims to exclusive monopoly power within the Florida Democratic Party by Florida State officials acting ex officio under a statute which they themselves devised.

EVADING THE "QUESTIONS PRESENTED"

It is patently scandalous that the four principal Respondents are not disposed to have their activities examined by this Court and to avoid this examination they have decided simply not to respond. They have left to the fifth named Respondent the task of substituting a defense on fictitious and extraneous issues which totally avoid and evade the facts and the most fundamental Constitutional issues raised by Petitioner.

Under normal circumstances, this maneuver would subject all five Respondents to sanctions such as those imposed under Rule 11 of the Federal Rules of Civil Procedure for appearing before the judiciary in a frivolous manner.

The Brief in Opposition submitted by the fifth Respondent, who was the least involved in the issues at litigation, reflects the same evasive intent. This Respondent has chosen to omit all comment on the seven "QUESTIONS PRESENTED" as if they were not part of this litigation. Petitioner inquires whether this unusual and evasive response is acceptable to the Justices or whether it affronts and violates the normal rules of proceedings published by this Court

In light of these extraordinary circumstances, Petitioner submits that his Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit perforce now has to be regarded as amended to include this novel maneuver. It is one additional fundamental issue to be

considered by this Court over and above those previously included in his Petition.

One set of previous fundamental issues concerned Petitioner's complaints against the named Florida State officials. Another set, equally important, was the failure of the Appeals Court, and the lower District Court, to address his specific complaints against the constitutionality of the activities of these Florida State officials and the constitutionality of the Florida statute under which they claimed to be empowered to act.

THE REAL INTENTIONS NOW REVEALED

Consequently, Petitioner asks the Court to consider whether this most recent maneuver, following upon all that preceded it, casts another defining and distinguishing light retroactively on the course of events over the last six years. Does it further reveal the real intent and determination of all the parties concerned: the Florida Attorney General and the Florida Department of Legal Affairs; the Florida Democratic Party; the Florida Legislature controlled by that party; and, most particularly, those Florida State officials who were the leading members of that Legislature which enacted the statute at issue and who thereupon served ex officio on the Presidential Candidate Selection Committee?

Further, have the members of the Florida executive branch, particularly the Florida Attorney General and Florida Department of Legal Affairs, entered into an improper long-term arrangement with the Florida Democratic Party and with the members of the Florida Legislature to subvert the

Constitutional rights of Petitioner and of the general membership of the Florida Democratic Party? –

Finally, does this most recent maneuver represent the intent of the Respondents to try to take advantage of the fact that Petitioner is not a lawyer and is acting Pro Se? In this connection, Petitioner calls attention to the fact that, whereas Esquire Levine stated in his Certificate of Service that he had placed a copy of his Brief into the mail on March 16, the date stamp of the postal service shows that it was mailed on March 21, five days later.

THE THRUST OF RESPONDENT'S ARGUMENTS

Petitioner asks these questions because of the specific arguments made by Attorney Levine, responding on behalf of the Florida Democratic Party.

Respondent argues as if there were some mystical, absolute character to primary elections, as if they were sui generis, a political phenomenon so distinct and so different from all other political activities that they exist in some other legal atmosphere, place and time than all other political actions and that somehow or other none of the Constitutional Articles and Amendments and none of the Federal Statutes apply in any way whatsoever to them, no matter how arbitrary the actions of persons claiming to be the party leaders.

It was such an extravagant claim which resulted in the various Civil Rights laws enacted by the Congress to protect racial minorities, in the affected States, from the denial of their Constitutional rights. The fact that these Civil Rights

laws are Constitutional shows that even primary elections are, in fact, subject to the Constitution. Certainly, if subject when violations take place against "protected classes", they are also subject, at least in some minimal other respects, to the Constitution when serious violations of the rights of the generality of the party members are involved.

Otherwise, the Constitution and the Civil Rights laws would themselves establish racial distinctions rather than, as intended, remove them.

Respondent seeks time and again to seize the very argument which Petitioner had made in contending that the Constitution protects political parties from unwarranted government intrusion and interference. But Respondent cannot accomplish this maneuver because Petitioner has shown conclusively that the Florida Democratic Party suffered precisely this unwarranted intrusion by the actions of the Florida State officials.

Respondent also argues there is no conflict between the decision being appealed in this Petition and the decisions of other Circuits and the Supreme Court. Just as he has resorted, by intentional omission, to suppressing the roles of the Florida State officials, he has omitted from his Table of Authorities all the cases which Petitioner had listed previously as clearly showing contradictory decisions.

Respondent also employs entirely out of context, certainly in Petitioner's case, the claim that Petitioner sought to infringe "on the Democratic Party of Florida's own right of association". He omits, as is his practice to make a point,

that this was a Presidential Primary and that the Florida State officials acting as members of the Presidential Candidate Selection Committee were bound by, but disregarded completely, the published criteria of the National Democratic Party as to how candidates and delegates to the National Convention must be selected. Those criteria explicitly prohibited the considerations used by Respondent to exclude bona fide Democratic Party members because such exclusion was prejudicial to the principles of the National Democratic Party in seeking to hold genuinely democratic primary elections forbidding discrimination by State and local party officials on racial, economic, sexual or ideological grounds. THE ONLY GROUND FOR EXCLUSION WAS MEMBERSHIP IN ANOTHER PARTY.

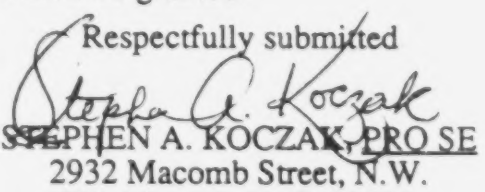
Petitioner was obviously a Democratic Party member, having been on the Florida Democratic Party Presidential primary ballot in 1984 and having been on the New Jersey Fourth Congressional District Ballot in 1986

Respondent here again, as elsewhere, has resorted to a fictitious, extraneous issue to mislead the Court.

CONCLUSION

For all the reasons given above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted



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CERTIFICATE OF SERVICE

I hereby certify that on the thirteenth day of May, 1992, I placed in the U. S. Postal Service Mail, first class, three copies each of the foregoing Reply Brief to Brief in Opposition to Petition for Writ of Certiorari to George L. Waas, Esquire, Assistant Attorney General, Department of Legal Affairs, THE CAPITOL, Suite 1501, Tallahassee, Florida 32399-1050, Telephone (904) 488-1573 and to John N. French, Esquire, Messer, Vickers, Caparello, French & Madsen, P.O. Box 1876, Tallahassee, Florida 32302-1806, Telephone (904) 222-0720 and to Mark S. Levine, Esquire, 245 East Virginia Street, Tallahassee, Florida 32301, Telephone (904) 222-6580.

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(In compliance with 28 U.S.C. #1746 and as required by Rule 29.5 (c), there is being left at the same time as this Reply Brief with the Clerk a further Proof of Service in the form of a separate Notarized Statement.)